Supreme Court, U.S.
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No.____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

JOSEPH E. HARHAI, PRO SE,
Petitioner,

v.

THE HONORABLE GARY P. CARUSO, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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47 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petitioner, Joseph E. Harhai, was deprived of his Constitutional right to a jury trial on the merits of his claims through summary dismissal of his Complaint on the pleadings based on the District Court's determination that the Petitioner has failed to set forth a proper cause of action under applicable Federal statutes and pendant state court jurisdiction.

2. Whether the Petitioner, Joseph E. Harhai, was deprived of his Constitutional right to a jury trial on the merits of his claims through the determination by the District Court that certain of the judicial Respondents are immune from suit on the basis of absolute or qualified immunity.

3. Whether the Petitioner, Joseph E. Harhai, was deprived of his Constitutional right to a jury trial on the merits of his claims based on the determination of the District Court that the Petitioner's Complaint in Civil Action was insufficient and failed to inform the Respondents of the basis of the Petitioner's claims required under Federal Court Rules of notice pleading.

4. Whether the Petitioner, Joseph E. Harhai, was deprived of his rights under the Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments to the Constitution of the United States, including the right to trial by jury as a result of improper applications of Pennsylvania law being at variance with the applications of the same laws relative to others similarly situated as in the cases of *Hartman v. Westmoreland County*, C.A. No. 93-1635; *Commonwealth of Pennsylvania v. Judge Joseph F. O'Kicki*, 597 A.2d 152 (1991); and *Commonwealth of Pennsylvania v. State Supreme Court Justice Rolf Larson.*

LIST OF PARTIES TO THESE PROCEEDINGS

The Petitioner herein is Joseph E. Harhai, an individual, who acting Pro Se, filed claims asserting various violations of his Constitutional and statutory rights. The fourteen (14) Respondents include four (4) judges of the Court of Common Pleas of Westmoreland County, Pennsylvania, Judges Gary P. Caruso, John E. Blahovec, Charles E. Marker, and Gilfert M. Mihalich; one (1) judge of the Superior Court of Pennsylvania, Judge Joseph A. Hudock, formerly of the Court of Common Pleas; four (4) individual practicing attorneys, William J. Wiker, Thomas J. Godlewski, Henry A. Hudson Jr., and Gary A. Falatovich; Petitioner's former spouse, Jane E. Kaylor Hart; Petitioner's former spouse's parole officer, Anthony Giunta; a court reporter for the Westmoreland County Court of Common Pleas, Joseph Shondelmyer; the Westmoreland County Children's Bureau; and the Westmoreland Mental Health Center.

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REFERENCE TO REPORTS OF LOWER COURT OPINIONS

The Order and Memorandum Opinion of the United States District Court for the Western District of Pennsylvania which dismissed the Petitioner's initial Complaint and

Amended Complaints with prejudice, and which also dismissed the pendant state claims, were entered on April 7, 1993; January 7, 1994; and February 4, 1994 and are attached hereto as Appendix A. The Judgment Order of the United States Court of Appeals for the Third (3rd) Circuit which affirmed the Judgement of the District Court was entered on September 7, 1994 and is attached hereto as Appendix A.[1] None of these decisions has been reported.

STATEMENT OF GROUNDS FOR SUPREME COURT JURISDICTION

The Judgment of the Third (3rd) Circuit Court of Appeals (Appendix A) was entered on September 7, 1994. This Petition is filed within ninety (90) days of that date. This Court has jurisdiction to review the Judgment in question by Writ of Certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

The constitutional provisions involved here are the Fifth (5th), Sixth (6th), Seventh (7th), Eighth (8th), and Fourteenth (14th) Amendments to the Constitution of the United States. The statutes are 42 U.S.C. §§§§ 1983, 1985, 1986, and 1988 and 18 U.S.C. §§ 1331 and 1343. These are set out verbatim in Appendix A.

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[1]Petitioner did not file a request for reconsideration of the decision of the Third (3rd) Circuit Court of Appeals affirming the District Court's Decision. The decision and judgment of the Appeals Court was entered on September 7, 1994, being properly postmarked at Philadelphia, Pennsylvania; however, it was apparently mailed at a later date and was not received until September 17, 1994, four (4) days before a reconsideration was due to be filed, leaving insufficient time to file a reconsideration, your Petitioner being Pro Se.

BASIS OF INITIAL FEDERAL JURISDICTION OF THE LOWER COURT

The Third (3rd) Circuit Court of Appeals exercised subject matter jurisdiction over this case being an Appeal from a Final Order and Judgment of the United States District Court for the Western District of Pennsylvania in accordance with 28 U.S.C. § 1291, upon a case brought for compensatory, statutory, and punitive damages pursuant to 42 U.S.C. §§§§ 1983, 1985, 1986, and 1988, 18 U.S.C. §§ 1962 and 1964, and pendant jurisdiction of a state claim.

STATEMENT OF THE CASE

On March 17, 1992, the Petitioner proceeded in filing a sixteen (16) count Complaint after the fact predicated solely on a Federal Question to the United States District Court for the Western District of Pennsylvania naming fifteen (15) Defendants (Respondents): four (4) Westmoreland County, Pennsylvania, Judges; one (1) Pennsylvania Superior Court Judge; four (4) Westmoreland County, Pennsylvania, attorneys; and various other Defendants, all named above. One of the original Defendants, Ronald Baughman, was dismissed on a Praecipe for Voluntary Dismissal on or about June 29, 1992, which reduced the number of Defendants (Respondents) to the present fourteen (14).

The Petitioner asserted violations of his constitutional rights under various provisions of the Civil Rights Statute, 42 U.S.C. §§§§ 1983, 1985, 1986, and 1988. In addition, the Petitioner asserted a claim under the Racketeer Influenced and Corrupt Organizations Act (R.I.C.O.), 18 U.S.C. § 1961 Et. Seq., as well as pendant claims under Pennsylvania law. The Petitioner's Complaint alleged various wrongful acts against the numerous Respondents including, inter alia, the following:

Judge Gary P. Caruso criminally extorted from the Petitioner costs in the amount of One Hundred Twenty-Two Dollars ($122.00); ordered Petitioner to take the witness stand under oath and unwillingly testify against himself; conducted a trial of the Petitioner without there being any notice or any proper petition filed before the Court; and he also improperly accepted the assignment of Petitioner's custody case.

Judge John E. Blahovec unlawfully trampled valid custody orders affirmed by the Pennsylvania State Superior Court which were in favor of the Petitioner and ordered the confinement of the Petitioner's son without good or compelling reason to three separate foster homes for a period of nine months, privately boasting of giving the Plaintiff and his son the treatment of "ax murderers."

Further, Judge Blahovec, after having recused himself in the Court of Common Pleas of Westmoreland County, and after being advised in writing that he should not proceed since he was being sued in Federal Court for having previously violated the Petitioner's Constitutional rights, nevertheless proceeded in his effort to reassert control of Petitioner's case and he thereafter improperly entered an official Court Order into the record, violating canons of judicial ethics.

Judge Charles E. Marker, also a conspirator herein, reassigned the Petitioner's case from Judge John E. Blahovec to Judge Gary P. Caruso. This reassignment to Judge Gary P. Caruso improperly circumvented the Judge who previously entered a favorable Order to the Petitioner, which was for the express purpose of denying the Petitioner due process of law, and was part of this continuing conspiracy.

Judge Gilfert M. Mihalich conspired when he assigned the Petitioner's case to Judge John E. Blahovec for the express purpose of denying the Petitioner due process of law, as part of an individual and collateral conspiracy.

Judge Joseph A. Hudock, charged as a conspirator herein, without proper cause dismissed a bench warrant against a kidnapper/criminal, serving to deny the Petitioner due process, and Judge Hudock refused to enforce regular and proper orders issued by the Courts.

Respondent William J. Wiker, Esquire, who represented the Petitioner, intentionally undermined the Petitioner's case when the Petitioner's personal letter to his son was covertly introduced in Court before Judge John E. Blahovec and where its content was distorted, resulting in discontinuance of the Petitioner's visitation rights, granting all rights to a criminal/kidnapper.

Respondent Thomas J. Godlewski, Esquire, a previous representative of the Petitioner, conspired with opposing counsel, Henry A. Hudson Jr., whereby he withheld filing of a timely opposition answer to a Petition seeking a supersedeas before Superior Court of Pennsylvania.

Respondent Henry A. Hudson Jr., Esquire fraudulently and deceptively delivered a preliminary objection/motion challenging the jurisdiction of the Westmoreland County Court. Attorney Hudson, along with Attorney Godlewski, conspired with Judge Joseph A. Hudock to circumvent the normal and regular judicial procedures of Court, by surreptitiously exercising ex-parte communications with the said Judge Joseph A. Hudock to defeat the jurisdiction of the Westmoreland County Court and to dismiss the Petitioner's case.

Gary A. Falatovich, appointed by Judge John E. Blahovec as Guardian Ad-Litem for the son of Joseph E. Harhai, who during that period of time was under a duty to represent the best interests of the subject child, refused to properly represent the best interests of the ten year old child and permitted the subject child to remain in three separate foster homes for a period of nine months without good or

compelling reason. Attorney Falatovich conspired with Judge John E. Blahovec, also a Respondent herein and a state official, and with the Children's Bureau of Westmoreland County, also a Respondent herein, and a state organization, and Westmoreland Mental Health Center, also a Respondent herein, to prevent the Petitioner from exercising his lawful rights to his child, thereby denying the Petitioner and his son constitutional and statutory rights as provided by law.

Jane E. Kaylor Hart, officially found by the Court to be a flagrant violator of the Court's Orders, deprived the Petitioner of his lawful parental rights and also deprived the subject child of his rights without raising and establishing in the record a legitimate, good, or compelling reason for this unlawful action. Jane E. Kaylor Hart conspired in agreement with Respondent Judge John E. Blahovec and with Henry A. Hudson Jr., Esquire and with Court Reporter Joseph Shondelmyer in creating a false and perjured testimonial record of a "staged" motions hearing and witness interview, which portrayed the Petitioner as a person unstable and unworthy of his rights and which served to deny the Petitioner his lawful rights granted by the Courts.

Probation Supervisor Anthony Giunta improperly declined to proceed on prosecutorial action on probationary violations against criminal/kidnapper Mrs. Hart. Respondent Giunta conspired with the Office of Domestic Relations and Judge John E. Blahovec to unlawfully protect Mrs. Hart from prosecution for probationary violations and possible incarceration for the express purpose of denying the Petitioner his lawful rights.

Joseph Shondelmyer, an employee of the Westmoreland County Court of Common Pleas of Judge John E. Blahovec, acting in his capacity as an official Court Reporter, intentionally created a fictitious record and transcript of a significant and important part of the testimony of the Petitioner by falsifying and distorting testimony of a motions hearing before the Court for the express purpose of

portraying the Petitioner as mentally incompetent, disturbed, and incoherent, thereby denying the Petitioner due process of law and a fair hearing by appellate review. Mr. Shondelmyer conspired with Judge John E. Blahovec and with Henry A. Hudson Jr., Esquire, and Mrs. Hart to create a false and perjured record of testimony of a Motions hearing intended to portray the Petitioner as an unworthy and unstable person.

Westmoreland County Children's Bureau interfered with the Petitioner's lawful rights, depriving for a period of about nine months the Petitioner's proper relationship with his son, and refused to permit the Petitioner to visit with his son without compelling or reasonable cause in and by agreement with Judge John E. Blahovec and other parties named herein.

Westmoreland Mental Health Center also deprived the Petitioner of rights, secured and guaranteed by the Constitution and federal laws of the United States of America by conspiring and agreeing with Judge John E. Blahovec and Westmoreland County Children's Bureau and with Gary A. Falatovich ad litem in denying the Petitioner his lawful rights as had been ordered by the Pennsylvania courts.

All of the Respondents, each and every one acting together and in concert with each other, conspired together and with one another to deprive the Petitioner of all of his constitutional rights to due process of law, and with the intent to harm and to prohibit the Petitioner from exercising his rights to a fair and impartial judicial system and to deprive the Petitioner of his property, his home, and his money.

Following Respondent's filing of preliminary objections and other motions, etc., Petitioner then filed two (2) Amended Complaints and two (2) Amended Consolidated

Briefs containing eight (8) issues and subsequent arguments.[2] The specific issues were the following:

I. Whether the Federal U.S. District Court has jurisdiction over the Petitioner's asserted claim concerning Federal Questions.

II. Whether the Petitioner has stated a proper cause of action for relief under 42 U.S.C. §§§§ 1983, 1985, 1986, and 1988 for violations of Petitioner's civil rights.

III. Whether the Petitioner has stated a proper cause of action for relief under 18 U.S.C. §§ 1962, 1964, and R.I.C.O.

IV. Whether the Petitioner has stated a proper cause of action for violations of his constitutional rights to due process of law, equal protection of the law, and rights under the Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments of the United States Constitution.

V. Whether the Federal Court has jurisdiction to determine the Petitioner's State or common law claims for fraud, deceit, malpractice, and abuse of civil process under the theory of Pendant Jurisdiction.

VI. Whether the Petitioner's claims are time-barred by statutes of limitations.

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[2]Although Petitioner briefed eight (8) issues, Respondents elected to reply to only six (6) of these issues, thereby waiving two of the issues, numbers six (6) and eight (8), being Petitioner's claims were time-barred by statutes of limitations, and Petitioner's claims were frivolous subject to sanctions.

VII. Whether the Petitioner's claims may be barred by the doctrine of judicial immunity.

VIII. Whether the Petitioner's claims are frivolous and subject to sanctions.

By District Court Order dated April 7, 1993, pursuant to Respondent's Motions for Summary Judgments the District Court without apparent consideration of the Petitioner's specific claims, dismissed Petitioner's claims against all of the Respondent judges, improperly citing judicial immunity in this case. The Respondent Judges in this case had been charged with extrajudicial activity.

In a Memorandum and Order dated January 7, 1994, The Honorable William L. Standish of the United States District Court dismissed all of Petitioner's claims as to Respondent Giunta with prejudice. The Motions to Dismiss of Respondents Wiker, Godlewski, Hudson, Falatovich, Hart, Shondelmyer, Westmoreland County Children's Bureau, and Westmoreland Mental Health Center, concerning the claims under 42 U.S.C. § 1983 and 1988, were granted without prejudice pursuant to Rule 12 (b)(6) and the Petitioner was instructed to file a Second Amended Complaint on or before January 19, 1994. The Motions to Dismiss of Respondents Wiker, Godlewski, Hudson, Falatovich, Hart, Shondelmyer, Westmoreland County Children's Bureau, and Westmoreland Mental Health Center, under 42 U.S.C. § 1986 and the R.I.C.O. Act, 18 U.S.C. § 1961, were granted with prejudice, pursuant to Rule 12 (b)(6) of the Federal Rules of Civil Procedure. Additionally, the Motions to Dismiss of Respondents Wiker, Godlewski, Hudson, Falatovich, Hart, Giunta, Shondelmyer, Westmoreland County Children's Bureau, and Westmoreland Mental Health Center, concerning the pendant state claims, were granted for lack of subject matter pursuant to Rule 12 (b)(1) of the Federal Rules of Civil Procedure without prejudice. The District Court indicated that if Petitioner filed a Second Amended Complaint setting forth a Federal Claim

against any Respondent, the pendant state claims would be reinstated as to that Respondent.

Petitioner then filed a Second Amended Complaint, consisting of twenty-two (22) pages and fifteen (15) counts, again naming each of the Respondents as defendants, with additional facts contained therein.

ARGUMENT FOR ALLOWANCE OF THIS WRIT

This Supreme Court of the United States must grant the Petitioner this Writ of Certiorari for the following three (3) fundamental reasons. They are:

First: The District Court Incorrectly Decided Facts

The Court incorrectly decided that the Respondent Judges were acting judicially rather than extrajudicially. The fact is that the judicial Respondent's activities are not within the purview of absolute or qualified immunity. The conduct of the Judges was not solely within the context of "custody litigation." Rather, as a matter of fact, their conduct was conspiratorial, malicious, fraudulent, violations of constitutional rights, racketeering, violations of canons of ethics, criminal kidnapping, and other wrongful extrajudicial factual activities.

The District Court incorrectly decided as fact that the Respondents did not cause injury to the Petitioner's "business or property," when, as a matter of fact, they did so, as Petitioner specifically set forth in Paragraph 57 of his Amended Complaint, and which injuries were caused not in the context of a "domestic relations case" but as otherwise stated above.

The Court incorrectly decided as a fact that the Petitioner failed to state facts showing a deprivation of Petitioner's rights, when he clearly and concisely did show the same.

The Court incorrectly determined that the Petitioner failed to show facts of a conspiracy between a "state actor" and a private party, when the Petitioner clearly set forth such facts.

The Court incorrectly determined as a fact that one of the Respondents, Anthony Giunta, a probation supervisor, was acting solely in his official capacity when, as a matter of fact, he was acting outside of his authority, and in a conspiratorial and improper manner, but under color of law.

The Court incorrectly determined that the Petitioner's Complaint failed to set forth facts which would prove that Respondent Joseph Shondelmyer violated Petitioner's rights under § 1983, which facts show that this Respondent acted to purposefully distort the official transcript of a court Motions hearing.

The Court also incorrectly determined that the Petitioner's Complaint failed to detail material facts which would prove or tend to prove that the Westmoreland County Children's Bureau conspired with others to interfere with Petitioner's rights.

The Court incorrectly decided that the Petitioner failed to allege "specific material facts" to show a conspiracy between various Respondents when the Petitioner did, in fact, allege sufficient material facts consistent with the requirement of federal notice pleading, which facts were set forth by the Petitioner in a clear, concise, and succinct fashion.

Second: The District Court Applied The Wrong Law

The District Court wrongfully applied the law of judicial immunity to the Respondent Judges since judicial immunity applies specifically to judicial rather than to non-judicial actions. The Respondent Judges, therefore, are not protected by alleged claims of immunity.

In this instance, the standard in the application of qualified and/or absolute immunity must not be permitted to significantly differ from that in the recent cases of former Cambria County, Pennsylvania, President Judge Joseph O'Kicki and Pennsylvania State Supreme Court Justice Rolf Larson. In both instances, neither justice was considered immune as a result of extrajudicial activity. Petitioner therefore requests this Honorable United States Supreme Court to evenly apply the law of extrajudicial (unprotected) acts by the Respondent Judges for the purpose of accountability relative to their unlawful conduct.

The Petitioner's claims in this matter initially arose from violations of Federal Civil Rights and R.I.C.O. Contrary to the District Court's misinterpretations (specifically its February 4, 1994, and its January 7, 1994, Memorandum and Order). The Petitioner's claims do not arise "out of an ongoing active Domestic Relations dispute in the Court of Common Pleas." The Petitioner's claims as set forth before the Honorable Court had been filed after the fact. The alleged subject child in this case will be (is) eighteen (18) years of age on December 27, 1994, and all state judicial proceedings have now run their course, and neither the District Court nor the Respondents have submitted proof of any active ongoing litigation in the state court system. Therefore, the alleged principle of Federalism in *Younger v. Harris*, § 401 U.S. 37 (1971) and *Humphrey v. Court of Common Pleas of York County*, 640 F. Supp. 1239 (M.D. Pa. 1986), and an abundance of other case law recited by the District Court and the within Respondents is simply irrelevant and as a matter of fact fails in application in this specific case since this is not a custody dispute. In this Civil Action, the Petitioner, a former litigant in the state court system seeks compensatory, statutory, and punitive damages (after the fact) as a result of federal violations. The Petitioner properly raised a "Federal Question" predicated on specific facts as set forth before the Court that there was a mutual understanding among the conspirators to take actions toward an unconstitutional end (*Duvall v. Sharp*, 905 F. 2d

1188, 1189, 8th Cir. 1990). The Petitioner more than satisfied Federal Notice Pleading when he abundantly detailed material facts relating to an alleged conspiracy between one or another of the Respondents indicating the specific manner in which they unlawfully interfered with the Petitioner's statutory and constitutional rights.

Third: The District Court's Judgment Is Wrong

The Court must take notice: the District Court grossly erred by misinterpreting this Civil Action. The Petitioner's claims do not arise from an active state court custody case seeking federal intervention. The Petitioner's claims filed after the fact initially arose from violations of Federal Civil Rights. The cause of action upon which Petitioner's suit is based is a complex matter involving these Respondents in their handling of divorce, custody, support, criminal conduct, criminal probation, foster care, mental health, inter alia.

The Petitioner avers he specifically, as a matter of fact, clearly and succinctly and with particularity stated proper causes of action for relief under 42 U.S.C. §§§§ 1983, 1985, 1986, and 1988 for violations of civil rights together with proper causes of action for relief under 18 U.S.C. §§§ 1962, 1964, and R.I.C.O., with proper causes of actions for violations of Petitioner's constitutional rights to due process of law, equal protection under the law, and rights pursuant to the Fifth, Sixth, Seventh, Eighth, and Fourteenth amendments of the United States Constitution and for violations of his civil rights under civil laws of the Commonwealth of Pennsylvania. The Petitioner further avers that claims in this Civil Action are not barred by the doctrine of absolute or qualified immunities, since the Respondent Judges committed extrajudicial actions outside their regular course of judicial proceedings and beyond the scope and activity of a court of law, e.g., criminal or quasicriminal, extortion, conspiracy, and R.I.C.O.

The District Court improperly determined the Petitioner failed to state a claim for relief under 42 U.S.C. §§ 1983 and 1988; the Court in this instance improperly determined the Respondents (Defendants) had not conspired with one another to deprive the Petitioner of a Federal Right; and also improperly determined the Respondents had not violated the R.I.C.O. statutes. This same District Court in its application of a double standard directly contradicts itself by its recent Court Decision relative to Civil Action No. 93-1635, *Mark P. Hartman v. Westmoreland County*, U. S. District Court for the Western District of Pennsylvania. In *Hartman v. Westmoreland County*, Judge William L. Standish determines § 1983 damages include as falling within the meaning of injury to "business or property," damages for counsel fees and expenses, humiliation and personal distress, etc., while in this case now before the Court, the same District Court of Judge William L. Standish determines that such damages are not proper.

There are three (3) specific legal issues in this case raised by the foregoing facts and circumstances, the resolution of which will dispose of this Appeal and require this case be remanded to the lower District Court for further proceedings. The issues are as follows:

1. Whether the Petitioner has set forth a proper cause of action under applicable Federal statutes and pendant state jurisdiction?

Suggested answer: Yes!

2. Whether certain Respondents are immune from litigation (suit) on the basis of absolute or qualified immunity?

Suggested answer: No!

3. Whether the Petitioner has complied with Federal Court rules concerning notice pleading?

Suggested answer: Yes!

The Petitioner respectfully contends he should be sustained on the basis of his suggested answers for the following reasons:

First Issue

I. *The Petitioner has set forth a proper cause of action under applicable Federal statutes and pendant state jurisdiction.*

The judicial Respondents have requested this Court to abstain from assuming jurisdiction in this case based on the alleged principle of Federalism set forth in *Younger v. Harris*, § 401 U.S. 37 (1971), on the theory that Federal Courts should not intrude on claims involving State judicial proceedings which concern State interests. In making this erroneous argument, they have misrepresented the claims as a child custody matter in which they improperly contend the Petitioner seeks Federal intervention. Quite simply, the gravamen of the plaintiff's claim is that he is not requesting the Federal Court to intervene in a child custody issue, nor in any State-related Court matters; rather, the Petitioner is seeking compensatory, statutory, and punitive damages and/or other damages the Court deems proper from the Respondents who have violated his U.S. constitutional rights. Therefore, Petitioner's claims are proper "Federal Questions" raised before this Honorable Court.

Petitioner in this action asserts that all of the named Respondents are "persons" under § 1983, and that they have individually and collectively violated his civil rights "under color of law" and they are therefore liable to the Petitioner. Petitioner has stated a cause of action under §§§§ 1983, 1985, 1986, and 1988, claiming that Respondents acted to violate the Petitioner's civil rights under color of law. A proper cause of action under § 1985, Section 3, allowing Petitioner to file a Civil Action suit for conspiracy, for interference, or deprivation of his civil rights has been clearly and succinctly stated.

Three (3) of the Respondents, Judge Gary P. Caruso, Attorney Henry A. Hudson Jr., and Jane E. Kaylor Hart, conspired together to deprive the Petitioner of his civil rights by extorting the sum of One Hundred Twenty-Two Dollars ($122.00) from the Petitioner on January 29, 1992, under the color of State law.

Pennsylvania criminal law provides that a person is guilty of theft (by extortion) in various circumstances, including actions where an official takes an action, or is caused to take an action, by obtaining property from a victim pursuant to Pennsylvania Crimes Code § 3923.

These three Respondents conspired to have the Petitioner incarcerated unless the Petitioner paid the sum of One Hundred Twenty-Two Dollars ($122.00) to Henry A. Hudson Jr. and Jane E. Kaylor Hart, there being no basis in fact or in law requiring the payment of monies by the Petitioner to the Respondents constituting extortion under Pennsylvania law, and depriving the Petitioner of his constitutionally guaranteed civil rights and equal protection of the law.

A case under 42 USCS § 1986 is derived from a claim under § 1985. Since the Petitioner has made out a claim under § 1985, and has averred facts that show the various Respondents must have had knowledge in common concerning the wrongs each other committed against the Petitioner, and knowing that such wrongs were committed, they did nothing to prevent their commission. The Respondents therefore violated 42 USCS § 1986. A § 1988 action provides that the Court, in its discretion, may allow the prevailing party (other than the United States) a reasonable attorney's fee. § 1988 is, like § 1986, derivative of claims under §§ 1983 and 1985, and the Petitioner has asserted in his Complaint a claim for counsel fees; therefore, a proper cause of action for § 1988 is made out in this case.

The Petitioner has stated a proper cause of action under the Racketeer Influence and Corrupt Organizations Act (R.I.C.O.). The R.I.C.O. statute provides:

The following elements are necessary to make out a R.I.C.O. claim by a private person under 18 U.S.C. § 1962 are: (1) the conducting of, (2) an enterprise, (3) through a pattern, (4) of racketeering activity, and (5) injury to the Petitioner's business or property. *Keystone Insurance Company v. Houghton*, 863 F.2d 1125 (3rd Cir. 1988) citing *Sedima, S.P.R.L. v. Imrex Company*, 473 U.S. 479, 496, 105 S. Ct. 3275, 3285 (1985).

Petitioner in this case has averred that the various Respondents have, collectively, conducted an enterprise, a "sub-rosa" judicial system where the participants conspired to extort money from the Petitioner and otherwise violated his civil rights, which injured the Petitioner by causing him to lose his property.

Contrary to the argument of the judicial Respondents that this case should not be within the purview of R.I.C.O. because it involves injuries in a "custody dispute," which was addressed in the case of *McMurtry v. Brasfield*, 654 F. Supp. 1222 (E.D. Va. 1987). In *McMurtry*, the injuries were personal injuries, rather than property injuries. In this case now before the Court, which is predicated on a Federal Question, the injury is in the context of the loss of property and money.

Petitioner's Complaint is replete with facts and circumstances which specifically set forth Respondents' violations of the rights guaranteed to him by the constitutional amendments.

Petitioner was deprived of his property without due process of law. He was subject to an excessive and improper fine. He was not treated equally and was not afforded the same protection of the law as others. The Respondents have

severely damaged the Petitioner's life by depriving him of his property and his relationship with his natural son, while choosing instead to foster a relationship between the child and a vile, unstable kidnapper/criminal, Jane E. Kaylor Hart, a Respondent herein.

All citizens are guaranteed the right to a fair and impartial court system. These Respondents have chosen to conspire to deprive the Petitioner of this right. This cause of action is specifically set forth in Paragraph Fifty-Seven (57) of the Petitioner's Second (2nd) Amended Complaint. The Petitioner's constitutional right to due process is further alleged to have been violated by specific facts set forth in Paragraphs Twenty-Eight (28) and Twenty-Nine (29) of the Second (2nd) Amended Complaint, wherein the Respondent Judge Gary P. Caruso ordered the Petitioner to testify against himself.

Respondent Judge Caruso failed to follow proper established procedures designed by judicial administration to ensure litigants' due process. Paragraph Thirty-Three (33) of the Petitioner's Second (2nd) Amended Complaint clearly and succinctly sets forth a cause of action for violation of the Petitioner's rights to due process through failure to afford the proper procedures. It is abundantly clear that the Petitioner has stated claims for violations of constitutional rights under due process, equal protection, and excessive fines.

The District Court has jurisdiction to hear State claims against the within named Respondents based upon the theory of Pendant Jurisdiction. The Petitioner has set forth claims having an independent basis for Federal jurisdiction against the within Respondents and Federal District Court has jurisdiction to determine the Pendant State claims.

For example, Petitioner asserts in his Complaint that Mr. Giunta took part in the continuation of civil proceedings against the Petitioner in a negligent manner for an improper

purpose. The proceedings apparently did terminate in favor of Respondent Jane E. Kaylor Hart. However, the proceedings involved the Petitioner, although the proceedings were not actually brought against the Petitioner.

Respondents Shondelmyer and Westmoreland County Children's Bureau also argue that the Petitioner's claims for abuse of civil process must be dismissed since these claims did not terminate in the Petitioner's favor. Since the underlying litigation is not the type of litigation, e.g., custody, which can be said to terminate in favor of one party or the other. Custody litigation is never "terminated," since each case continues and remains subject to continuing jurisdiction of the Court issuing decrees based upon the best interest of the subject child. Consequently, it cannot be proven that the suit terminated other than in favor of the Petitioner, who has been the legal custodian since September 1979 and again on February 22, 1982, and thereafter.

Petitioner asserts that a cause of action for fraud, deceit, and misrepresentation is made out since Respondent Shondelmyer (1) represented that his record was true and correct (2) when it was false and fraudulent for the purpose of (3) aiding the Court to "set up" the Petitioner, causing him to appear as unstable and unfit to have custody and to deprive him of his appellate rights and (4) in reliance on the false, fictitious transcript (5) caused damages to the Petitioner.

Petitioner therefore has set forth in concise language a proper cause of action for State claims against each of these Respondents.

Second Issue

II. *The Respondents (judicial and governmental) are not immune from suit on the basis of absolute or qualified immunities*.

Judicial immunity is a bar to a civil suit for damages only when a judge is in the performance of a judicial act. This is clearly set forth by our Supreme Court in *Mireles v. Waco*, 502 U.S. ____, 112 S. Ct. 286, 116 L.Ed.2d 9 (1991) and *Stump v. Sparkman*, 435 U.S. 349, 356, 98 S. Ct. 1099, 55 L.Ed.2d 331 (1978).

In this case, the acts with which the State judicial Respondents are charged are not judicial acts, but rather they are extrajudicial acts. The actions cited against the Judges were done outside the regular course of judicial proceedings, and were not founded upon or connected, i.e., interpolated, and were beyond the scope and activity of a court of law. Therefore, the acts of the Judges were either criminal or quasi-criminal, e.g., extortion, conspiracy, and R.I.C.O. (the Racketeer Influence and Corrupt Organizations Act).

Consequently, the Judges were not acting in their judicial capacity when they conspired to violate the Petitioner's rights. Further, Respondent Probation Supervisor Anthony Giunta was acting outside of his judicial authority in the performance of his duties as a probation officer. Mr. Giunta, like the judges, was charged with conspiracy to commit criminal and quasi-criminal acts.

Therefore, none of these Respondents is immune in this case, and the Petitioner's claims are not barred by the doctrines of absolute or qualified immunity.

Third Issue

III. *The Petitioner has complied with Federal court rules concerning notice pleading, and therefore the Petitioner's Complaint is sufficient.*

Petitioner's Complaint more than satisfies Federal Notice Pleading where he abundantly details specific material facts with particularity relating to the actions of the Respondents.

The Federal Rules of Civil Procedure are specific in clarifying the elements of a Complaint:

Rule 8. General Rules of Pleading.

(a) Claims For Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

Rule Eight (8) further admonishes the pleader to aspire to brevity, thus:

(e) Pleading To Be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

Finally, it is reasonable to conclude that above all else that such unjustified conduct by the lower District Court Judge and Respondents' counsels being unreasonable by making excessive demands of a Pro Se Petitioner (non-lawyer) to actually violate Federal Pleading standards and practices by lengthening his Complaint is unconscionable.

The final short, brief, concise, and unequivocal admonition of Rule Eight (8) states:

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

In this Civil Action, the Petitioner's Complaint has given the Respondents proper notice of that which they have been called upon to defend against.

CONCLUSION

For the reasons as set forth above, and since the Petitioner has been wrongfully denied his constitutional right of access to the civil courts, a Writ of Certiorari should issue to review the Judgment and Opinions of the lower courts in this matter.

Respectfully submitted,

Joseph E. Harhai
Box 47, Ruffsdale, PA 15679

Date: November 28, 1994

APPENDIX

Appendix A — Constitutional and Statutory Provisions Involved

Amendment V to the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI to the United States Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence.

Amendment VII to the United States Constitution provides as follows:

> In Suits at common law "where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by

> a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law....

Amendment VIII to the United States Constitution provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section I to Amendment XIV to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The (R.I.C.O.) Racketeer Influenced and Corrupt Organizations Act § 1962 provides as follows:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of any unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to sue or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign

commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Appendix B — Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-3098

JOSEPH E. HARHAI

v.

THE HONORABLE GARY P. CARUSO;
THE HONORABLE JOHN E. BLAHOVEC;
THE HONORABLE CHARLES MARKER;
THE HONORABLE GILFERT M. MIHALICH,
Court of Common Pleas of Westmoreland County,
Pennsylvania;
THE HONORABLE JOSEPH A. HUDOCK,
Superior Court sitting in Pittsburgh, Pennsylvania;
WILLIAM J. WIKER, Esquire;
HENRY A. HUDSON, Esquire;
GARY A. FALATOVICH, Esquire, Attorney at law;
JANE E. KAYLOR HART, an individual;
RONALD BAUGHMAN, an individual;
TONY GIUNTA, an individual;
JOSEPH SHONDELMYER, an individual;
WESTMORELAND COUNTY CHILDREN'S BUREAU;
WESTMORELAND MENTAL HEALTH CENTER;
THOMAS J. GODLEWSKI, Esquire

JOSEPH E. HARHAI, *Appellant*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil Action No. 92-cv-00655)
District Judge: The Honorable William L. Standish

Submitted June 24, 1994

Before: STAPLETON, HUTCHINSON, AND ROTH,
Circuit Judges

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ORDERED AND ADJUDGED that the judgment of the district court entered February 4, 1994, be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

ss_____
Walter K. Stapleton
Circuit Judge

ATTEST:

ss_____
P. Douglas Sisk
Clerk

Dated: September 7, 1994

Appendix C — Order of the United States Court District Court for the Western District of Pennsylvania

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOSEPH E. HARHAI,	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No. 92-655
	)	
THE HONORABLE GARY P. CARUSO,	)	
THE HONORABLE JOHN E. BLAHOVEC,	)	
THE HONORABLE CHARLES MARKER,	)	
THE HONORABLE GILFERT M.	)	
MIHALICH, THE HONORABLE JOSEPH A.	)	
HUDOCK, WILLIAM J. WIKER, Esquire,	)	
THOMAS J. GODLEWSKI, Esquire,	)	
HENRY A. HUDSON, Esquire, GARY A.	)	
FALATOVICH, Esquire, JANE E.	)	
KAYLOR HART, TONY GIUNTA,	)	
JOSEPH SHONDELMYER,	)	
WESTMORELAND COUNTY CHILDREN'S	)	
BUREAU, and WESTMORELAND	)	
MENTAL HEALTH CENTER,	)	
Defendants.	)	

ORDER

AND NOW, this 4th day of February, 1994, in accordance with the foregoing memorandum, it is hereby ORDERED as follows:

1. The motions of defendants William J. Wiker, Esquire, Thomas J. Godlewski, Esquire, Henry A.Hudson Jr., Esquire, Gary A. Falatovich, Esquire, Jane E. Kaylor

Hart, Joseph Shondelmyer, Westmoreland County Children's Bureau, and Westmoreland Mental Health Center (the remaining defendants) to dismiss the complaint of plaintiff, Joseph E. Harhai, for failure to state a claim, pursuant to Fed.R.Civ.P. 12(b)(6), are granted.

2. The claims asserted against the remaining defendants by plaintiff in his second amended complaint are dismissed with prejudice.

3. This is a final order. The Clerk shall mark the above-captioned action closed.

ss_____
William L. Standish
United States District Judge

Appendix D — Memorandum and Order of the United States Court District Court for the Western District of Pennsylvania

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOSEPH E. HARHAI, *Plaintiff,*	)	
	)	Civil Action
v.	)	No. 92-655
THE HONORABLE GARY P. CARUSO, THE HONORABLE JOHN E. BLAHOVEC, THE HONORABLE CHARLES MARKER, THE HONORABLE GILFERT M. MIHALICH, THE HONORABLE JOSEPH A. HUDOCK, WILLIAM J. WIKER, Esquire, THOMAS J. GODLEWSKI, Esquire, HENRY A. HUDSON, Esquire, GARY A. FALATOVICH, Esquire, JANE E. KAYLOR HART, TONY GIUNTA, JOSEPH SHONDELMYER, WESTMORELAND COUNTY CHILDREN'S BUREAU, and WESTMORELAND MENTAL HEALTH CENTER, *Defendants.*	)	

MEMORANDUM

I

By memorandum and order dated January 7, 1994, the motions of defendants William J. Wiker, Esquire, Thomas J. Godlewski, Esquire, Henry A. Hudson Jr., Esquire, Gary A. Falatovich, Esquire, Jane E. Kaylor Hart, Joseph Shondelmyer, Westmoreland County Children's Bureau, and Westmoreland Mental Health Center (the remaining defendants) to dismiss the claims of plaintiff,

Joseph E. Harhai, under 42 U.S.C. §§ 1983 and 1988, pursuant to Fed.R.Civ.P. 12(b)(6), were granted.[1] The dismissal was entered without prejudice to the right of plaintiff to file a second amended complaint, setting forth his Section 1983 claim against the remaining defendants with sufficient particularity.[2]

On January 28, 1994, plaintiff filed a second amended complaint.[3] After consideration of that complaint, and the motions to dismiss previously filed by the remaining defendants in response to plaintiff's first amended complaint, the court concludes that the motions to dismiss should be granted.

---

[1]In the January 7, 1994, memorandum and order, the court also dismissed, without prejudice, plaintiff's state law claims against the remaining defendants for lack of subject matter jurisdiction. In the event plaintiff filed a second amended complaint which adequately set forth a federal claim against the remaining defendants, the court indicated that the state law claims would be reinstated.

[2]Plaintiff was directed to file a second amended complaint on or before January 19, 1994. However, plaintiff filed a motion for enlargement of time to file the second amended complaint, and plaintiff was given an additional 14 days to file the complaint.

[3]The second amended complaint continues to assert claims against four present judges and one former judge of the Court of Common Pleas of Westmoreland County, Pennsylvania, and against Tony Giunta, a probation officer who apparently supervised plaintiff's former wife, defendant Jane E. Kaylor Hart. However, the claims against the defendant judges were dismissed with prejudice by order dated April 7, 1993, and the claims against Mr. Giunta were dismissed with prejudice by the court's January 7, 1994, order. In addition, despite the dismissal, with prejudice, of plaintiff's RICO claim and his claims under 42 U.S.C. §§ 1985 and 1986 on January 7, 1994, the second amended complaint continues to assert these claims against all defendants.

II

As noted in the court's January 7, 1994, memorandum, this case arises out of a fifteen year, ongoing domestic relations dispute between plaintiff and his former wife, defendant Jane E. Kaylor Hart, in the Court of Common Pleas of Westmoreland County, Pennsylvania. The state court actions relate to the custody and support of plaintiff's minor son.

With respect to plaintiff's section 1983 claims,[4] it is well established that he must allege facts which show the deprivation of a right, privilege, or immunity secured by the Constitution or federal law by a person acting under color of state law. Remaining defendants William J. Wiker, esquire, Thomas J. Godlewski, Esquire, Henry A. Hudson, Esquire, Gary A. Falatovich, Esquire, Jane E. Kaylor Hart, and Westmoreland Mental Health Center are private parties, rather than state actors. The Section 1983 claims against the private parties are based on an alleged conspiracy between those defendants, the defendant judges, and other state actors to deprive plaintiff of his civil rights. Specifically, it is alleged that the defendants conspired to deprive plaintiff of his lawful custodial and visitation rights.

To plead a claim of conspiracy between a state actor and a private party that will state a claim against the private party under Section 1983, a plaintiff "must allege with sufficient particularity and show with specific material facts that the private party and the state official or actor reached some understanding or agreement, or plotted, planned, and conspired together, to deprive plaintiff of a federal right." See *Chicarelli v. Plymouth Garden Apartments*, 551 F.Supp.

---

[4]In connection with plaintiff's claim under 42 U.S.C. § 1988, seeking attorney's fees and costs, such claim can only be pursued in the event he recovers on the claim under 42 U.S.C. § 1983.

532, 539 (E.D.Pa.1982). Despite the opportunity to amend his complaint a second time, plaintiff has again failed to state a claim upon which relief can be granted as to the remaining defendants who are private parties. In particular, he has failed to allege specific material facts that show some agreement or plot between the defendants to deprive him of a federal right. Therefore, the motions of defendants William J. Wiker, Esquire, Thomas J. Godlewski, Esquire, Henry A. Hudson, Esquire, Gary A. Falatovich, Esquire, Jane E. Kaylor Hart, and Westmoreland Mental Health Center to dismiss will be granted, pursuant to Fed.R.Civ.P. 12(b)(6), with prejudice.

Turning to remaining defendant Joseph Shondelmyer, a court reporter for the Court of Common Pleas of Westmoreland County, Pennsylvania, the January 7, 1994, order granted Mr. Shondelmyer's motion to dismiss plaintiff's Section 1983 claim without prejudice because the first amended complaint failed to allege, except in the most conclusory terms, the factual basis for the Section 1983 claim against Mr. Shondelmyer.[5] A review of the allegations of plaintiff's second amended complaint reveals that plaintiff has failed to identify the alleged distortions of the official transcript of the state court hearing which was transcribed by defendant Shondelmyer, or the substance of the testimony that was added or omitted for the purported purpose of denying plaintiff due process of law, a fair hearing and his right to appellate review. Accordingly, Mr. Shondelmyer's motion to dismiss will be granted, pursuant to Fed.R.Civ.P. 12(b)(6), with prejudice.

Finally, in connection with remaining defendant Westmoreland County Children's Bureau (the Bureau), for purposes of ruling on the Bureau's motion to dismiss, the court will again assume that the Bureau is an agency of

---

[5]Mr. Shondelmyer is a state actor for purposes of Section 1983.

Westmoreland County.[6] After considering the allegations of second complaint against the Bureau, the court again concludes that plaintiff fails to detail sufficiently the material facts relating to the alleged conspiracy between the Bureau and the other defendants or to indicate the manner in which the Bureau interfered with plaintiff's custodial and visitation rights. Under the circumstances, the Bureau's motion to dismiss for failure to state a claim will be granted with prejudice.

In summary, to plead conspiracy under the civil rights statute, a complaint must allege specific facts suggesting that there was a mutual understanding among the conspirators to take actions directed toward an unconstitutional end. See *Duvall v. Sharp*, 905 F.2d 1188, 1189 (8th Cir.1990).[7] Although the court recognizes plaintiff's frustration in seeking what he considers to be his lawful custodial and visitation rights, the court is compelled to conclude that he has failed to set forth specific facts indicating that there was a mutual understanding among the defendants to engage in unconstitutional conduct. Therefore, he has failed to state a claim under Section 1983. As a result, federal jurisdiction is lacking and the second amended complaint will be dismissed with prejudice.

An order follows.

---

[6]It is not clear that the Bureau is a state actor.

[7]See also *Humphrey v. Court of Common Pleas of York County*, 640 F.Supp. 1239 (M.D.Pa.1986) (Section 1983 complaint which alleged conspiracy by former attorney and judges, masters, or judicial officers of court of common pleas to refuse to present request for joint physical custody, but which failed to allege times and places of meetings and general role of each conspirator in creating and furthering conspiracy, failed to satisfy specificity requirement for pleading conspiracy).

Appendix E — Order of the United States Court District Court for the Western District of Pennsylvania

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOSEPH E. HARHAI, *Plaintiff,*	)	
	)	Civil Action
v.	)	No. 92-655
THE HONORABLE GARY P. CARUSO, THE HONORABLE JOHN E. BLAHOVEC, THE HONORABLE CHARLES MARKER, THE HONORABLE GILFERT M. MIHALICH, THE HONORABLE JOSEPH A. HUDOCK, WILLIAM J. WIKER, Esquire, THOMAS J. GODLEWSKI, Esquire, HENRY A. HUDSON, Esquire, GARY A. FALATOVICH, Esquire, JANE E. KAYLOR HART, TONY GIUNTA, JOSEPH SHONDELMYER, WESTMORELAND COUNTY CHILDREN'S BUREAU, and WESTMORELAND MENTAL HEALTH CENTER, *Defendants.*	)	

ORDER

AND NOW, this 7th day of January, 1994, in accordance with the foregoing memorandum, it is hereby ORDERED as follows:

1. The motions of defendants William J. Wiker, Esquire, Thomas J. Godlewski, Esquire, Henry A. Hudson Jr., esquire, Gary A. Falatovich, Esquire, Jane E. Kaylor

Hart, Tony Giunta, Joseph Shondelmyer, Westmoreland County Children's Bureau, and Westmoreland Mental Health Center to dismiss plaintiff's claim against them under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, are granted, and the RICO claim is dismissed with prejudice.

2. The motion of defendant Tony Giunta to dismiss plaintiff's first amended complaint is granted with prejudice as to all the claims asserted therein pursuant to Fed.R.Civ.P. 12(b)(6). The Clerk shall mark the case closed as to defendant Tony Giunta.

3. The motions of defendants William J. Wiker, Esquire, Thomas J. Godlewski, Esquire, Henry A. Hudson Jr., Esquire, Gary A. Falatovich, Esquire, Jane E. Kaylor Hart, Joseph Shondelmyer, Westmoreland County Children's Bureau, and Westmoreland Mental Health Center to dismiss plaintiff's claims against them under 42 U.S.C. §§ 1983 and 1988 are granted without prejudice pursuant to Fed.R.Civ.P. 12(b)(6). Plaintiff may, on or before January 19, 1994, file a second amended complaint, setting forth the allegations of his Section 1983 claim against any such defendant referred to in this paragraph with sufficient particularity. Plaintiff's failure to do so will result in the dismissal of his claims under Sections 1983 and 1988 with prejudice.

4. The motions of defendants William J. Wiker, Esquire, Thomas J. Godlewski, Esquire, Henry A. Hudson Jr., Esquire, Gary A. Falatovich, Esquire, Jane E. Kaylor Hart, Tony Giunta, Joseph Shondelmyer, Westmoreland County Children's Bureau, and Westmoreland Mental Health Center to dismiss the claims asserted against them in plaintiff's first amended complaint under 42 U.S.C. §§ 1985 and 1986 are granted with prejudice pursuant to Fed.R.Civ.P. 12(b)(6).

5. The motions of defendants William J. Wiker, Esquire, Thomas J. Godlewski, Esquire, Henry A. Hudson

Jr., Esquire, Gary A. Falatovich, Esquire, Jane E. Kaylor Hart, Tony Giunta, Joseph Shondelmyer, Westmoreland County Children's Bureau, and Westmoreland Mental Health Center to dismiss the state law claims against them are granted for lack of subject matter jurisdiction, pursuant to Fed.R.Civ.P. 12(b)(1), without prejudice. In the event plaintiff files a second amended complaint which adequately sets forth a federal claim against any such defendant on or before January 19, 1994, the state law claims will be reinstated as to that defendant. If plaintiff fails to file a second amended complaint as to any defendant in accordance with this order, he may reassert the state law claims against that defendant in a Pennsylvania state court pursuant to 41 Pa.C.S. § 5103.

ss_____
William L. Standish,
United States District Judge

Appendix F — Order of the United States Court District Court for the Western District of Pennsylvania

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOSEPH E. HARHAI, *Plaintiff,*	)	
	)	Civil Action
v.	)	No. 92-655
THE HONORABLE GARY P. CARUSO, et al., *Defendants.*	)	

ORDER

I

Plaintiff, Joseph E. Harhai, in his first amended complaint in the above-captioned action asserts claims for damages against 14 defendants. Four defendants are judges of the Court of Common Pleas of Westmoreland County, Pennsylvania. One defendant is a judge of the Superior Court of Pennsylvania who was formerly a judge of the Court of Common Pleas of Westmoreland County, Pennsylvania. the defendant judges of the Court of Common Pleas are The Honorable Gary P. Caruso, The Honorable John E. Blahovec, The Honorable Charles E. Marker, and The Honorable Gilfert M. Mihalich. The defendant judge of the Superior Court of Pennsylvania is The Honorable Joseph A. Hudock (the defendant judges).

Plaintiff asserts federal claims under civil rights statutes, 42 U.S.C. §§§§ 1983, 1985, 1986, and 1988 for alleged violations of his constitutional rights. He also asserts

a claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1982 and 1964 (RICO), as well as pendent claims under Pennsylvania law. Jurisdiction is founded on 28 U.S.C. §§§ 1331, 1332, and 1343.

The defendant judges move, pursuant to Fed.R.Civ.P. 12(b)(6) to dismiss plaintiff's complaint against them on the ground that they have an absolute immunity from liability to plaintiff on the claims asserted by him. The court agrees. The complaint will be dismissed.

II

A judge who has jurisdiction over the subject matter and is performing a judicial act is immune from liability from damages arising out of his or her conduct. *Mireles v. Waco*, ____ U.S. ____, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991); *Stump v. Sparkman*, 435 U.S. 349, 356, 98 S.Ct. 1099, 55 L.ED.2d 331 (1978). A judge is entitled to such immunity regardless whether the conduct involved is erroneous, malicious, in excess of judicial authority, or the product of a conspiracy. *Stump v. Sparkman*, supra at 356-357; *Dennis v. Sparks*, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980). To be subject to liability, a judge must act "in the clear absence of all jurisdiction." *Bradley v. Fisher*, 13 Wall 335, 351 (1872); *Stump v. Sparkman*, supra at 357.

Here, the conduct of the defendant judges alleged in the first amended complaint involved the conduct of custody litigation in the Court of Common Pleas of Westmoreland County, Pennsylvania, over which the judicial defendants had jurisdiction. See 42 Pa.C.S. § 931; Pennsylvania Constitution, Art. 5, § 5. Under the circumstances, the defendant judges are immune from liability to plaintiff for the damages he seeks. An order follows dismissing plaintiff's first amended complaint as to them.

III

AND NOW, this 7th day of April, 1993, it is hereby ORDERED as follows:

1. The motion to dismiss plaintiff's first amended complaint pursuant to Fed. R.Civ.P. 12(b)(6) filed by defendant judges Gary P. Caruso, John E. Blahovec, Charles E. Marker, Gilfert M. Mihalich, and Joseph A. Hudock is granted.

2. The first amended complaint of plaintiff Joseph E. Harhai is dismissed with prejudice pursuant to Fed.R.Civ.P. 41(b) as to the defendant judges.

ss_____
William L. Standish,
United States District Judge

Supreme Court, U.S.
FILED
DEC 28 1994
OFFICE OF THE CLERK

(2)

No. 94-1005

IN THE

Supreme Court of the United States

October Term, 1994

JOSEPH E. HARHAI, *PRO SE*,

Petitioner,

vs.

THE HONORABLE GARY P. CARUSO, THE HONORABLE JOHN E. BLAHOVEC, THE HONORABLE CHARLES MARKER, THE HONORABLE GILFERT M. MIHALICH, Court of Common Pleas of Westmoreland County, Pennsylvania, THE HONORABLE JOSEPH A. HUDOCK, Superior Court Sitting in Pittsburgh, Pennsylvania, WILLIAM J. WIKER, Esquire, HENRY A. HUDSON, JR., Esquire, GARY A. FALATOVICH, Esquire, Attorney at Law, JANE E. KAYLOR-HART, an individual, RONALD BAUGHMAN, an individual, TONY GIUNTA, an individual, JOSEPH SHONDELMYER, an individual, WESTMORELAND COUNTY CHILDREN'S BUREAU, WESTMORELAND MENTAL HEALTH CENTER, THOMAS J. GODLEWSKI, Esquire,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

I. Whether there exists an important question of federal law or other substantial consideration warranting review on certiorari of the September 7, 1994 Judgment Order of the United States Court of Appeals for the Third Circuit which affirmed the February 4, 1994 Order of the United States District Court for the Western District of Pennsylvania dismissing with prejudice Petitioner's Second Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6)?

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the Petition for Writ of Certiorari on page ii and in the case caption to this Brief.

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F.R.C.P. 12(b)(6) 1,6

Supreme Court Rule:

S.Ct.R. No. 10 11

No. 94-1005

IN THE

Supreme Court of the United States

October Term, 1994

JOSEPH E. HARHAI, *PRO SE*,

Petitioner,

vs.

THE HONORABLE GARY P. CARUSO, THE HONORABLE JOHN E. BLAHOVEC, THE HONORABLE CHARLES MARKER, THE HONORABLE GILFERT M. MIHALICH, Court of Common Pleas of Westmoreland County, Pennsylvania, THE HONORABLE JOSEPH A. HUDOCK, Superior Court Sitting in Pittsburgh, Pennsylvania, WILLIAM J. WIKER, Esquire, HENRY A. HUDSON, JR., Esquire, GARY A. FALATOVICH, Esquire, Attorney at Law, JANE E. KAYLOR-HART, an individual, RONALD BAUGHMAN, an individual, TONY GIUNTA, an individual, JOSEPH SHONDELMYER, an individual, WESTMORELAND COUNTY CHILDREN'S BUREAU, WESTMORELAND MENTAL HEALTH CENTER, THOMAS J. GODLEWSKI, Esquire,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CITATIONS OF THE OPINIONS AND JUDGMENTS DELIVERED BELOW

On January 7, 1994 and February 4, 1994, the United States District Court for the Western District of Pennsylvania at Civil Action Number 92-655 issued Memorandum Opinions and Orders of Court granting Respondents' Motions to Dismiss Petitioner's First and Second Amended Complaints with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6). Copies of the District Court's Memorandum Opinions and Orders of Court are collectively attached to the Petition for Writ of Certiorari as Appendix "A".

On September 7, 1994 the United States Court of Appeals for the Third Circuit issued a Judgment Order at Number 94-3098 which affirmed the Order of Court entered by the District Court on February 4, 1994. A copy of the Court of Appeal's Judgment Order is attached to the Petition for Writ of Certiorari as Appendix "A".

STATEMENT OF JURISDICTION

Petitioner submits that this Court has appellate jurisdiction pursuant to 28 U.S.C. §1254(1).

For the reasons discussed below, respondent submits that there is no important federal issue to be reviewed and certiorari should be denied. Therefore, there is no basis for jurisdiction.

TEXT OF STATUTES

1. 28 U.S.C. §1254 provides:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

Petitioner cites as additional constitutional and statutory authority the Fifth (5th), Sixth (6th), Seventh (7th), Eighth (8th) and Fourteenth (14th) Amendments to the United States Constitution, 42 U.S.C. §§1983, 1985, 1986 and 1988 and 18 U.S.C. §§1331 and 1343 on page two (2) and in Appendix "A" of the Petition for Writ of Certiorari.

COUNTER-STATEMENT OF THE CASE

Petitioner, Joseph E. Harhai, has filed a Petition for Writ of Certiorari, *pro se* requesting that this Court review a Judgment Order of the United States Court of Appeals for the Third Circuit. The Judgment Order was entered on September 7, 1994 at Number 94-3098.

The litigation which gave rise to the instant petition was commenced by petitioner with the filing of a 16 count Complaint in the United States District Court for the Western District of Pennsylvania ("District Court") on or about March 17, 1992. The defendants included, *inter alia*, four judges on the Court of Common Pleas of Westmoreland County, Pennsylvania, one judge on the Superior Court of Pennsylvania, four private attorneys, including Respondent, Thomas J. Godlewski, Esquire ("Attorney Godlewski"), petitioner's ex-wife, a Westmoreland County probation officer, a court reporter, the Westmoreland County Children's Bureau and the Westmoreland County Mental Health Center. The Complaint purportedly averred claims under 42 U.S.C. §§1983, 1985, 1986 and 1988, R.I.C.O., 18 U.S.C. §1961, *et seq.* and pendent state law claims for "Fraud, Deceit and Professional Negligence" against Attorney Godlewski. Petitioner's claims arose out of former custody proceedings involving his minor son in the Court of Common Pleas of Westmoreland County, Pennsylvania which took place in the 1970s and early 1980s. Attorney Godlewski filed a Motion to Dismiss the Complaint and supporting Brief.

Following the filing of a First Amended Complaint by petitioner, Attorney Godlewski again filed a Motion to Dismiss and supporting Brief to supplement his earlier Motion to Dismiss. In his First Amended Complaint, petitioner set forth the following allegations against Attorney Godlewski:

COUNT SEVEN

Joseph E. Harhai vs. Thomas J. Godlewski, Esquire, for Fraud, Deceit and Professional Negligence

45. Defendant, Thomas J. Godlewski, Esquire, knowingly, deceptively, and conspiratorially did commit malfeasance of office on or about June 26, 1980, in an act of collusion with the adversarial counsel, Henry A. Hudson, Jr., by failing to file for the Plaintiff, Joseph E. Harhai, an opposition answer to a Petition dated June 26, 1980, requesting a supersedeas before Superior Court of Pennsylvania, Sitting at Pittsburgh. The Defendant, Thomas J. Godlewski, Esquire, did undermine the Plaintiff, causing serious, legal, financial, and emotional distress.

* * *

COUNT FIFTEEN

Joseph E. Harhai vs. All Named Defendants for Civil Conspiracy

55. All of the above-named Defendants, acting together and in concert with each other, from on or about November 3, 1977 and continuing until the date of the preparation of this Complaint, about March 1, 1992, conspired together and with one another to deprive the Plaintiff of his constitutional rights to due

process of law, and with the intent to harm the Plaintiff and to prohibit the Plaintiff from exercising his rights to a fair and impartial judicial system, and to deprive the Plaintiff of his property.

By Opinion and Order dated April 7, 1993 the District Court dismissed with prejudice petitioner's First Amended Complaint as to the respondent judges with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6). Subsequently, by Memorandum Opinion and Order dated January 7, 1994, the District Court dismissed with prejudice petitioner's R.I.C.O. and 42 U.S.C. §§1985 and 1986 claims against Attorney Godlewski from the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). With respect to petitioner's R.I.C.O. claims, the District Court held that since all of petitioner's alleged harm arose out of domestic relations disputes with his former wife, respondent Jane E. Kaylor-Hart, petitioner had not and indeed could not allege that the conduct of the respondents caused an injury to his "business or property" within the meaning of 18 U.S.C. §1964(c). The District Court dismissed with prejudice petitioner's claims under 42 U.S.C. §1985 for failure to allege on the part of the respondents any of the conduct prohibited therein. Petitioner's derivative claim under 42 U.S.C. §1986 was dismissed with prejudice for the same reason. The District Court also dismissed, without prejudice and with leave to amend, petitioner's claims under 42 U.S.C. §§1983, 1988 and pendent state law claims against Attorney Godlewski.

Petitioner filed a Second Amended Complaint on or about January 28, 1994. In his Second Amended Complaint, petitioner set forth the following allegations against Attorney Godlewski:

COUNT SEVEN

Joseph E. Harhai vs. Thomas J. Godlewski, Esquire for Fraud, Deceit, and Professional Negligence and for Deprivation of Plaintiff's Civil Rights Under 42 U.S.C.A. §§1983 and 1988

47. Defendant, Thomas J. Godlewski, Esquire, knowingly, deceptively, and conspiratorially did commit malfeasance of office on or about June 26, 1980, in an act of collusion with the adversarial counsel, Henry A. Hudson, Jr., by failing to file for the Plaintiff, Joseph E. Harhai, an opposition answer to a Petition dated June 26, 1980, requesting a supersedeas before Superior Court of Pennsylvania, Sitting at Pittsburgh. The Defendant, Thomas J. Godlewski, Esquire, did undermine the Plaintiff, causing serious legal, financial, and emotional distress.

This Defendant, acting under color of state law, deprived the Plaintiff of rights, privileges, and immunities secured and guaranteed by the Constitution and federal laws of the United States of America, arising out of a conspiracy between the above named and the other thirteen (13) named Defendants to deprive the Plaintiff of such rights, and the above named reached an agreement and/or understanding with one or another of the named state official or officials or Defendant actor or actors, and/or this Defendant, a private party or entity, planned and/or

conspired together to deprive the Plaintiff of a federal right, as more particularly and specifically described as follows:

> Defendant Thomas J. Godlewski, together with Defendant Henry A. Hudson, Jr., Esquire, another private Defendant herein, conspired and agreed with Judge Joseph Hudock, also a Defendant herein and a state official, to delay and to fail to seek to timely enter an Order of Court to dissolve a supersedeas until after the subject of said Order to wit: Defendant Jane E. Kaylor-Hart filed the jurisdiction of the Court, which actions served to deny Plaintiff his lawful child custodial and visitation rights.

* * *

COUNT FIFTEEN

Joseph E. Harhai vs. All Named Defendants for Civil Conspiracy

> 57. All of the above-named Defendants, acting together and in concert with each other, from on or about November 3, 1977, and continuing until the date of the preparation of this Complaint, about March 1, 1992, aspired together and with one another to deprive the Plaintiff of his constitutional rights to due process of law, and with the intent to harm the Plaintiff and to prohibit the Plaintiff from exercising his rights to a fair and impartial judicial system, and to deprive the Plaintiff of his property.

By Memorandum Opinion and Order dated February 4, 1994 the District Court entered a Final Order dismissing with prejudice petitioner's Second

Amended Complaint against Attorney Godlewski. The District Court held that petitioner failed to allege violations of 42 U.S.C. §1983 against the remaining respondents, including Attorney Godlewski, all private parties, because the Second Amended Complaint did not state with sufficient particularity and/or show with specific material facts that the private party respondents and the state official respondents reached an understanding or agreement or plotted, planned or conspired together to deprive petitioner of a federal right. Petitioner's §1988 claim for attorney's fees and costs was also dismissed by the District Court.

Petitioner subsequently filed a Notice of Appeal from the District Court Orders dated January 7, 1994 and February 4, 1994 on or about February 28, 1994 to the United States Court of Appeals for the Third Circuit. By Judgment Order dated September 7, 1994 the Court of Appeals affirmed the District Court's February 4, 1994 Order of Court.

Petitioner has now filed a Petition for Writ of Certiorari seeking this Court's discretionary review. For the following reasons, respondent Thomas J. Godlewski, Esquire respectfully submits that the Petition for Writ of Certiorari should be denied.

SUMMARY OF ARGUMENT

There is no important federal issue involved in this action. Petitioner seeks review of a Judgment Order of the United States Court of Appeals for the Third Circuit which involved the application of well-reasoned and controlling federal law to the facts pleaded by petitioner.

The United States Court of Appeals for the Third Circuit properly applied controlling law. The subject Judgment Order is not repugnant to the United States Constitution or any other federal law. The Judgment Order does not create a substantial conflict of laws and no important federal question is at issue. Moreover, in issuing its Judgment Order, the Court of Appeals did not depart from the accepted and usual course of judicial proceedings, nor did the court sanction such a departure by the District Court. As such, respondent Thomas J. Godlewski, Esquire respectfully submits that certiorari should be denied.

ARGUMENT

Judgment Orders issued by a United States court of appeals may be reviewed by this Court by writ of certiorari. Supreme Court Rule 10 "Considerations Governing Review on Writ of Certiorari" provides in pertinent part:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> > (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> > * * * * * * * * *
>
> > (c) When . . . a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Clearly, this action does not involve any of the above circumstances. Petitioner has not alleged that the Judgment Order issued by the Third Circuit Court of Appeals is in conflict with the decision of another

court of appeals on the same matter. Nor has petitioner alleged that the Third Circuit decided a federal question in a way in conflict with a state court of last resort. Moreover, the petition does not persuasively allege that in rendering its Judgment Order, the Third Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision. Lastly, the Court of Appeals has not decided an important question of federal law which has not been, but should be decided by this Court nor has the Court of appeals decided a federal question in a way which conflicts with an applicable decision of this Court. The present petition, like all of the prior pleadings, documents, motions and briefs filed by petitioner in the District Court and/or Court of Appeals merely discloses his frustration in failing to obtain what he considered to be his lawful custodial and visitation rights regarding his minor son in the Court of Common Pleas of Westmoreland County, Pennsylvania.

None of these considerations are applicable to this action. At issue here is the United States Court of Appeals for the Third Circuit's application of well-reasoned and controlling federal law to the particular facts of this claim. As such, respondent Thomas J. Godlewski, Esquire submits that the Petition for Writ of Certiorari should be denied.

CONCLUSION

For these reasons, respondent, Thomas J. Godlewski, Esquire, respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

Supreme Court, U.S.
FILED
DEC 28 1994
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No. 94-1005

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

JOSEPH E. HARHAI,
Petitioner,

-vs-

THE HONORABLE GARY P. CARUSO, ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Filed on Behalf of:
GARY FALATOVICH, RESPONDENT

H. REGINALD BELDEN, JR.
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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Where civil rights claims are made against a court-appointed guardian ad litem should certiorari be granted when this court has previously refused to grant it following a holding that the court-appointed guardian has absolute immunity?

II. Where RICO claims are made against a court-appointed guardian by the father of the ward on a theory that the guardian conspired with the mother of the ward, judges and lawyers to deprive the father of custody, should certiorari be granted to review a holding that the claimed injury is personal and does not involve the requisite business or property interest for a RICO claim?

STATEMENT OF THE CASE

The claims presented in this case arise from various domestic relations actions between the petitioner and his former wife, Jane Kaylor Hart, a respondent herein. These two parties were involved in a lengthy dispute before the Court of Common Pleas of Westmoreland County, Pennsylvania, concerning, inter alia, custody and support of their son. The litigation was lengthy and protracted, involving several different attorneys and judges over the passage of time. Eventually the Petitioner grew dissatisfied with the outcome of the proceedings and then initiated this lawsuit in the United States District Court for the Western District of Pennsylvania, alleging a variety of claims

against judges, attorneys, the court-appointed guardian of his son, a county agency, a private mental health institution and a probation officer, all of whom were involved in one way or another in the underlying domestic relations dispute. The original complaint alleged civil rights claims pursuant to 42 U.S.C. Sections 1983, 1985, 1986 and 1988, RICO claims pursuant to 18 U.S.C. Sections 1962 and 1964 and pendant state claims Motions to dismiss, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure were filed on behalf of all of the named defendants. An amended complaint was filed shortly thereafter, with leave of court. The contents and averments of the amended complaint varied little from the original complaint.

Once again, Rule 12(b)(6) motions to dismiss were filed on behalf of the various defendants. The Honorable William L. Standish of the United States District Court entered a memorandum and order dated January 7th, 1994, dismissing with prejudice the Sections 1985 and 1986 Civil Rights claims regarding the respondent, Gary A. Falatovich, they were dismissed on the basis of his absolute immunity. He also dismissed the RICO claims as to each of the defendants. As to the judges and Anthony Giunta, the county probation officer, the claims pursuant to 42 U.S.C. Sections 1983 and 1988 were also dismissed with prejudice. As to the remaining defendants, the Section 1983 and 1988 claims were dismissed without prejudice and the Court specifically instructed the plaintiff to set forth each material facts

upon which the petitioner based his claim that the various defendants conspired to deprive him of his constitutionally protected rights. The pendant state claims asserted against each of these defendants were dismissed without prejudice and the Court indicated that they would be reinstated if the petitioner filed an amended complaint setting forth the federal causes of action with the requisite specificity.

A second amended complaint was filed by the petitioner. It was nearly identical to the original and first amended complaints. The District Court then dismissed all of the remaining federal claims with prejudice, based upon the petitioner's failure to set forth a

cause of action upon which relief may be granted.

A timely appeal was taken by the petitioner to the United State Court of Appeals for the Third Circuit. In a judgment order dated September 7, 1994, the Court of Appeals affirmed the judgment of the District Court. The petitioner now seeks review of the above judgments entered by the Court of Appeals and the District Court in his petition for writ of certiorari.

ARGUMENT

The petitioner sets forth three reasons for which this court should grant the requested review:

(1) the district court incorrectly decided facts (Petition, p. 10);

(2) the district court applied the wrong law (Petition, p. 11); and

(3) the district court's judgment is wrong (Petition, p. 13).

As to each of the reasons, he simply sets forth the reasons for which he disagrees with the conclusions reached by the district court and affirmed by the court of appeals. He does not, however, state any reasons which are either special or important and, certainly, none which rise to the character sufficient to warrant a review by this court. It is simply impossible for this court to review every decision of a district court, or even a court of appeals, in which the losing party believes that the court incorrectly decided facts,

applied the wrong law, or issued a judgment which was wrong.

Review by this court must be limited to matters which are of the utmost importance to our society and the administration of justice in this country. Nothing raised in the petition for writ of certiorari under consideration even hints at rising to such a character.

Petitioner made two claims against respondent, Gary A. Falatovich: civil rights claims and a RICO claim.

With regard for the basis on which the civil rights claims were dismissed against Mr. Falatovich, the court-appointed guardian ad litem, this court has denied certiorari in cases in which

the same issues were raised. Myers v. Morris, 810 F.2d 1437 (8th Cir. 1987), cert. den., 484 U.S. 828, 108 S. Ct. 97, 98 L.Ed.2d 58 (1988). In that case, it was concluded that a court-appointed guardian ad litem enjoyed absolute immunity. Other circuits have so held. Ashbrook v. Hoffman, 617 F.2d 474 (7th Cir. 1980); Gardner by Gardner v. Parson, 874 F.2d. 131 (3d Cir. 1989); McCuen v. Polk County, Iowa, 893 F.2d 172 (8th Cir. 1990); Kurzawa v. Miller, 732 F.2d 1456 (6th Cir. 1984). No review by this court is necessary in this case as the facts do not differ.

With regard to the RICO claim against Mr. Falatovich, petitioner simply disagrees with the conclusion of the district court, affirmed by the court of

appeals, that he did not and could not allege injury to business or property requisite to the bringing of a RICO claim. His claims are personal. No review by this court of such a conclusion would be warranted. Further, none of the other requisite elements of a RICO action were set forth with reqisite specificity in the complaint or either of the ammended complaints, as was raised by the respondents in the District Court.

CONCLUSION

Nothing set forth in the Petition for Writ of Certiorari warrants it being granted nor, even, the expendiature of the time it has taken the respondents to respond to it, or for the court and its staff to read it.

There is no unsettled question of law nor is there a conflict among the circuits or between the federal courts and a state court of last resort.

The writ should not be granted.

Respectfully submitted;

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CERTIFICATE OF SERVICE

I, **H. REGINALD BELDEN, JR., ESQUIRE**, do hereby certify that three true and correct copies of the within **BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** to the United States Supreme Court dated December 29th 1994, were served upon the following:

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the lower Courts' dismissal of the Plaintiff-Petitioner's Second Amended Complaint alleging civil rights violations putatively arising out of Petitioner's State Court custody litigation was appropriate?

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COUNTERSTATEMENT OF THE CASE

A. Procedural History

Petitioner commenced the present civil action on March 17, 1992. Petitioner thereafter sought to amend his Complaint and, on August 10, 1992, the United States District Court for the Western District of Pennsylvania granted Petitioner leave to amend his Complaint. Petitioner then filed an Amended Complaint. Thereafter, each of the Respondents moved to dismiss Petitioner's Amended Complaint. On April 7, 1993, the District Court entered an Order dismissing Petitioner's Amended Complaint. As to Respondents Joseph Shondelmyer, Westmoreland County Children's Bureau, and Westmoreland Mental Health Center, the dismissal was without prejudice and leave was granted to file a Second Amended Complaint. On January 28, 1994, Petitioner filed a Second Amended Complaint. The Respondents again filed Motions to Dismiss pursuant to Fed.R.Civ.P. 12(b)(6). On February 4, 1994, the District Court entered an Order dismissing Petitioner's Second Amended Complaint. On February 28, 1994, Petitioner filed an appeal to the United States Circuit Court of Appeals for the Third Circuit and, on September 7, 1994, the Third Circuit affirmed the lower Court's dismissal of Plaintiff's Second Amended Complaint. Petitioner now asks this Court to grant *certiorari* in this matter.

B. Counter Statement of Facts

The present litigation arises out of allegations that the Respondents have denied Petitioner his constitutionally guaranteed rights during the course of custody litigation which was undertaken in the

Court of Common Pleas for Westmoreland County, Pennsylvania. As to the Respondents Joseph Shondelmyer, Westmoreland County Children's Bureau, and Westmoreland Mental Health Center, Petitioner's Second Amended Complaint, at issue in the present appeal, makes the following allegations:

COUNT TWELVE

Joseph E. Harhai vs. Joseph Shondelmyer for Abuse of Civil Process, Perjury, Fraud, and Deceit and for Deprivation of Plaintiff's Civil Rights under 42 U.S.C. §§1983 and 1988

54. On May 28, 1991, Defendant, Joseph Shondelmyer, who was then an employee of the Westmoreland County Court of Common Pleas of Judge John E. Blahovec, acting in his capacity as an official Court Reporter, intentionally created a fictitious record and transcript of a significant and important part of the testimony of the Plaintiff by falsifying and distorting testimony of a custody/motions hearing before the Court, for the express purpose of portraying the Plaintiff as mentally incompetent, disturbed, and incoherent. Racketeer Defendant Joseph Shondelmyer intentionally and maliciously changed and distorted the official transcript of the hearing, leaving out certain testimony and adding other testimony for the purpose of denying the Plaintiff due process of law and a fair hearing, and to deny the Plaintiff his right to appellate review of the Court's decision.

This Defendant acting under color of state law, deprived the Plaintiff of rights, privileges, and immunities secured and guaranteed by the Constitution and federal laws of the United States of America, arising out of a conspiracy

between the above named and the other thirteen (13) named Defendants to deprive the Plaintiff of such rights, and the above named reached an agreement and/or understanding with one or another of the named state official or officials or Defendant actor or actors, and/or this Defendant, a private party or entity, planned and/or conspired together to deprive the Plaintiff of a federal right, as more particularly and specifically described as follows:

Defendant Joseph Shondelmyer conspired and agreed with Judge John E. Blahovec, one of the Defendants herein, and who was and is a state official, and with Henry A. Hudson, Jr., Esquire, and Jane E. Kaylor Hart, private party Defendants herein, to create a false and perjured record of testimony of a Motions hearing intended to portray the Plaintiff as a person who should not retain custody of his child, and which served to further deny Plaintiff his lawful custodial and visitation rights.

COUNT THIRTEEN

Joseph E. Harhai vs. Westmoreland County Children's Bureau for Abuse of Civil Process and for Deprivation of Plaintiff's Rights under 42 U.S.C. §§1983 and 1988

55. Defendant named herein, beginning on or about August 27, 1987, and thereafter, as part of a racketeering conspiracy of Westmoreland County did unlawfully, knowingly, and abusively interfere with the Plaintiff's lawful custodial rights with his son, depriving for a period of about nine months the Plaintiff's proper relationship with his son, and refusing to allow the Plaintiff to visit with his son without any

compelling or reasonable cause contrary to the Plaintiff's valid custody, as ordered by the Pennsylvania courts.

This Defendant, acting under color of state law, deprived the Plaintiff of rights, privileges, and immunities secured and guaranteed by the Constitution and federal laws of the United States of America, arising out of a conspiracy between the above named and the other thirteen (13) named Defendants to deprive the Plaintiff of such rights, and the above reached an agreement and/or understanding with one or another of the named state official or officials or Defendant actor or actors, and/or this Defendant, a private party or entity, planned and/or conspired together to deprive the Plaintiff of a federal rights, as more particularly and specifically described as follows:

Defendant Westmoreland County Children's Bureau, a state organization acting by and through its officers and employees, and in cooperation and agreement with Judge John E. Blahovec and other private Defendants herein, conspired to deprive the Plaintiff of his lawful custodial and visitation rights.

COUNT FOURTEEN

Joseph E. Harhai vs. Westmoreland Mental Health Center for Abuse of Civil Process and for Deprivation of Plaintiff's Civil Rights under 42 U.S.C. §§1983 and 1988

56. Defendant named herein, beginning on or about August 27, 1987, and thereafter, as part of a Westmoreland County racketeering scheme, in unlawful conspiracy with the Westmoreland County Court, did fraudulently, without

compelling reason or good cause, abusively interfere with the Plaintiff's lawful custodial rights, and did for compensatory purposes interfere with a normal father/son family relationship, and did for the purpose of profiteering interfere contrary to the Plaintiff's valid custody as had been ordered by the Pennsylvania courts, all without good cause or reason.

This Defendant, acting under color of state law, deprived the Plaintiff of rights, privileges, and immunities secured and guaranteed by the Constitution and federal laws of the United States of America, arising out of a conspiracy between the above named and the other thirteen (13) named Defendants to deprive the Plaintiff of such rights, and the above named reached an agreement and/or understanding with one or another of the named state official or officials or Defendant actor or actors, and/or this Defendant, a private party or entity, planned and/or conspired together to deprive the Plaintiff of a federal right, as more particularly and specifically described as follows:

Defendant Westmoreland Mental Health Center conspired and agreed with Judge John E. Blahovec and Westmoreland County Children's Bureau, two of the named Defendants herein and who are a state official and a state organization, respectively, and with Gary A. Falatovich, a private Defendant, to deny the Plaintiff his lawful custodial and/or visitation rights.

COUNT FIFTEEN

Joseph E. Harhai vs. All Named Defendants for Civil Conspiracy

57. All of the above-named Defendants, acting together and in concert with each other, from on or about November 3, 1977, and continuing until the date of the preparation of this complaint, about March 1, 1992, conspired together and with one another to deprive the Plaintiff of his constitutional rights to due process of law, and with the intent to harm the Plaintiff and to prohibit the Plaintiff from exercising his rights to a fair and impartial judicial system, and to deprive the Plaintiff of his property.

58. Due process violations include, but are not limited to the following rights, privileges and immunities secured by the Constitution of the United States:

A. Right to fair and uniform application of Pennsylvania Rules of Civil Procedure.

B. Right to a fair application of Pennsylvania Case Law relative to evidentiary proof.

C. Right not to be coerced to give up legal and civil rights.

D. Right not to be subject to abuse of process.

E. Right not to have a valid contract (consent agreement dated March 16, 1988) impaired.

F. Right not to be subject to Pendant State Torts.

G. Right not to be subjected to prohibited racketeering activities.

Pursuant to Fed.R.Civ.P. 12(b)(6), the District Court dismissed, with prejudice, the federal civil rights claims. The District Court dismissed, pursuant to Fed.R.Civ.P. 12(b)(1), without prejudice, the state law claims.

SUMMARY OF ARGUMENT

Petitioner has not articulated a sound basis upon which *certiorari* should be granted in this matter. Petitioner has not indicated that the Third Circuit Court of Appeals decision in this matter is in conflict with another United States Court of Appeals decision on the same matter, or with the precedent of this Court. Further, the Third Circuit Court of Appeals Decision did not conflict with a decision of the Pennsylvania Supreme Court. Additionally, the Third Circuit decision did not depart so far from the usual and accepted course of judicial proceedings such that this Court should exercise its supervisory capacity.

Moreover, the decision which the Third Circuit Court of Appeals rendered was correct. Petitioner's Second Amended Complaint, insofar as the allegations against the Respondents Joseph Shondelmyer, Westmoreland County Children's Bureau, and Westmoreland Mental Health Center is inadequate as to both form and substance, under the Federal Rules of pleading. Consequently, dismissal of Petitioner's Second Amended Complaint was appropriate.

ARGUMENT

A. PETITIONER HAS NOT ARTICULATED ANY SOUND BASIS UPON WHICH *CERTIORARI* SHOULD BE GRANTED IN THE PRESENT CASE.

Rule 10.1 of this Court articulates the bases which this Court will examine in determining whether or not to grant *certiorari* in a particular case. Rule 10.1, and the sub-parts thereunder, indicate that typically, there must be a circuit court decision in conflict with the decision of another circuit (in similar cases), conflict with the decision of a state court of last resort on a federal question, or a departure from the usual course of judicial proceedings such that this Court should exercise its supervisory powers. It is respectfully submitted that none of these circumstances are present in this case.

1. The substantive basis upon which Petitioner's Second Amended Complaint was dismissed conformed to the Jurisprudence of this Court.

a. Abstention.

The Respondents Shondelmyer, Westmoreland County Children's Bureau, and Westmoreland Mental Health Center submit that the District Court's dismissal of Petitioner's Second Amended Complaint was appropriate under the *Feldman-Rooker* Doctrine and pursuant to *Younger v. Harris,* 401 U.S. 37 (1971). Petitioner's claims impinge on significant state interests which may be harmed by the intrusion of the federal court into state court matters. Moreover, it is well established that abstention is appropriate in the context of domestic relations' matters, as State

Courts have strong interest and great competence in adjudicating such matters, which require continuing judicial supervision. *In Re: Burrus*, 136 U.S. 586 (1990); *Moore v. Sims*, 442 U.S. 415 (1979); *Solomon v. Solomon*, 516 F.2d 1018 (2d Cir. 1967). Additionally, a United States District Court has no authority to review final judgments of a State Court in judicial proceedings. This is the *Feldman-Rooker* Doctrine. *District of Columbia v. Feldman*, 460 U.S. 462, 582 (1983); *Rooker v. Fidelity Trust Company*, 263 U.S. 413 (1923). In short, the substantive basis upon which Petitioner's Second Amended Complaint was dismissed conformed to the established precedents of this Court, and need not be reviewed.

b. The Second Amended Complaint fails to state a Cause of Action Upon which relief may be granted for putative violations of 42 U.S.C. 1985 and 1986.

Petitioner also purports to state causes of action against the Respondents Shondelmyer, Westmoreland County Children's Bureau and Westmoreland Mental Health Center for violation of equal protection of the laws pursuant to Sections 1985 and 1986 of Title 42. Petitioner has not, however, alleged interference with federal offices, and therefore does not set forth any cause of action under Section 1985 (1). Petitioner has also failed to allege a racial or otherwise class based invidiously discriminatory animus behind the Respondent's actions, and therefore has not stated a claim pursuant to Section 1985 (2) or (3). *Griffin v. Breckinridge*, 403 U.S. 88, 102 (1971); *Brawer v. Horowitz*, 535 F.2d 830, 840 (3d Cir. 1976). Furthermore, inasmuch as a Section 1986 claim is derivative of the Section 1985 claim, the 1986 claim

must fail. *Rourke v. U.S.*, 744 F. Supp. 100 (E.D.Pa. 1988); *Silo v. City of Philadelphia*, 593 F. Supp. 870, 874 (E.D. Pa. 1984).

2. Petitioner's failure to conform the Second Amended Complaint to the well established pleading requirements pertinent to the causes of action Petitioner asserts, warranted dismissal of his Second Amended Complaint.

Federal Rule of Civil Procedure 8(a) requires that a pleader state in a short and plain manner the grounds upon which the pleader contends they are entitled to relief. In the context of a civil rights action, federal pleading practice has required that a civil rights plaintiff state with specificity the material facts upon which the plaintiff premises their right to relief. *Rose v. Bartle*, 891 F.2d 331, 353-354 (3d Cir. 1989); *Darr v. Wolfe*, 767 F.2d 79, 80 (3d Cir. 1988);

The specificity requirement is based upon "[t]he dual policy concerns of [1] protecting state officials from a deluge of frivolous claims and [2] providing state officials with sufficient notice of the claims asserted to enable preparation of responsive pleadings." *Colburn v. Upper Darby Twp.*, 838 F.2d 663, 666 (3d Cir. 1988), *cert. denied*, 103 L.Ed.2d 808, 109 S.Ct. 1338 (1989).

Insofar as Respondent Shondelmyer is concerned, the allegations which Petitioner makes concerning Shondelmyer's putative deprivation of the Petitioner's civil rights, are conclusory and non-specific. Petitioner alleges that Respondent Shondelmyer ". . . intentionally created a fictitious record and transcript of a significant and important part of the testimony of the plaintiff by falsifying and

distorting testimony of a custody/motions hearing before the Court, for the express purpose of portraying Plaintiff as mentally incompetent, disturbed, and incoherent." Petitioner goes on to allege that Respondent Shondelmyer "intentionally and maliciously" changed and distorted the official transcript of the hearing. Petitioner does not, however, identify with any degree of specificity, those portions of the transcript which were changed, or distorted.

Furthermore, Petitioner has failed to identify material facts relating to Shondelmyer, or Westmoreland County Children's Bureau, sufficient to support a cause of action for violation of civil rights. Additionally, to the extent that the Court may deem, for the purposes of analyzing Petitioner's pleadings, Westomoreland Mental Health Center to be a state actor within the meaning of 42 U.S.C. Section 1983, Petitioner has again failed to set forth material facts, with any degree of specificity, sufficient to support a cause of action against Westmoreland Mental Health Center. Consequently, the District Court and the Third Circuit, appropriately dismissed Petitioner's Second Amended Complaint.

a. Petitioner's conspiracy allegations are insufficient as a matter of law.

Petitioner also alleges that the Respondents Shondelmyer, Westmoreland County Children's Bureau, and Westmoreland Mental Health Center conspired with the other Respondents in this matter to deprive Petitioner of his civil rights. Petitioner does not, however, articulate with any specificity the material facts upon which the conspircy allegation is

premised. Similarly, Petitioner asserts a conspiracy on the part of the Respondents Westmoreland County Children's Bureau and Westmoreland Mental Health Center to deprive Petitioner of his civil rights. However, Petitioner does not plead any material facts upon which the conspiracy may be premised. In view of the foregoing, the District Court, and the Third Circuit, correctly found that Petitioner's Second Amended Complaint was insufficient, as a matter of law, to state a claim upon which relief could be granted. *Duvall v. Sharp,* 905 F.2d 1188, 1189 (8th Cir. 1990); *Chicarelli v. Plymouth Gardner Apartment,* 551 F. Supp. 532, 539 (E.D. Pa. 1982).

b. Petitioner's Second Amended Complaint, as to the allegations of racketeer influenced corrupt organization activity are legally insufficient.

Other than the bald allegation that the Westmoreland County Court System "routinely engages in a pattern of racketeering activities . . ." Petitioner has not articulated any factual basis for relief pursuant to the Racketeer Influenced Corrupt Organization Act, 18 U.S.C. §1961 *et seq.* In order to state a claim upon which relief may be granted, the Petitioner must allege five elements. The elements are (1) the conduct of (2) an enterprise (3) through a pattern (4) of racketeering activity, resulting in (5) injury to the plaintiff's business or property. *Keystone Insurance Company v. Houghton,* 473 U.S. 479, 495 (1985). A "pattern" requires at least two acts and "racketeering activity" means any one of those predicate offenses listed in 18 U.S.C. §1961(a)(1).

In the present case, Petitioner alleges no specific acts which would allow one to conclude that the enforcement of Pennsylvania's child custody laws is within the scope of RICO. Indeed, in the case of *McMurtry v. Brasfield,* 654 F.Supp. 1222 (E.D. Va. 1987), for example, the scope of RICO was held not to encompass domestic relations disputes. The United States District Court for the Eastern District of Virginia dismissed the Complaint in *McMurtry* on a Motion to Dismiss. Consequently the Third Circuit appropriately affirmed dismissal of Petitioner's Second Amended Complaint.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, it is respectfully submitted that this Court may appropriately deny Petitioner's Petition for a Writ of *Certiorari*.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 6 1995
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No. 94-1005

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

JOSEPH E. HARHAI,
Petitioner,

-vs-

THE HONORABLE GARY P. CARUSO, ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Filed on Behalf of:
ANTHONY GIUNTA, RESPONDENT

JOHN K. GREINER, ESQUIRE
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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Where civil rights claims are brought against a probation officer for his failure to file a probation violation against the respondent's former wife, should certiorari be granted when this Court has previously refused to grant it following holdings that a probation or parole officer has absolute immunity?

II. Where RICO claims are presented against a probation officer by the ex-husband of the client which he supervised on a theory that the probation officer conspired with a guardian at litem, judges and lawyers to deprive the ex-husband of custody of a minor child, should certiorari be granted to review a holding that the claimed injury is personal and does not involve the requisite business or property interest for a RICO claim?

STATEMENT OF THE CASE

The claims presented in this case arise from various domestic relations actions between the petitioner and his former wife, Jane Kaylor Hart, a respondent herein. These two parties were involved in a lengthy dispute before the Court of Common Pleas of Westmoreland County, Pennsylvania, concerning, inter alia, custody and support of their son. The litigation was lengthy and protracted, involving several different attorneys and judges over the passage of time. Eventually the Petitioner grew dissatisfied with the outcome of the proceedings and then initiated this lawsuit in the United States District Court for the Western District of Pennsylvania, alleging a variety of claims

against judges, attorneys, the court-appointed guardian of his son, a county agency, a private mental health institution and a probation officer, all of whom were involved in one way or another in the underlying domestic relations dispute. The original complaint alleged civil rights claims pursuant to 42 U.S.C. Sections 1983, 1985, 1986 and 1988, RICO claims pursuant to 18 U.S.C. Sections 1962 and 1964 and pendant state claims.

Motions to dismiss, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure were filed on behalf of all of the named defendants. An amended complaint was filed shortly thereafter, with leave of court. The contents and averments of the amended complaint varied little from the original complaint.

Once again, Rule 12(b)(6) motions to dismiss were filed on behalf of the various defendants. The Honorable William L. Standish of the United States District Court entered a memorandum and order dated January 7th, 1994, dismissing with prejudice the Sections 1985 and 1986 Civil Rights claims regarding the respondent, Gary A. Falatovich, they were dismissed on the basis of his absolute immunity. He also dismissed the RICO claims as to each of the defendants. As to the judges and Anthony Giunta, the county probation officer, the claims pursuant to 42 U.S.C. Sections 1983 and 1988 were also dismissed with prejudice. As to the remaining defendants, the Section 1983 and 1988 claims were dismissed without prejudice and the Court specifically instructed the plaintiff to set forth each material facts

upon which the petitioner based his claim that the various defendants conspired to deprive him of his constitutionally protected rights. The pendant state claims asserted against each of these defendants were dismissed without prejudice and the Court indicated that they would be reinstated if the petitioner filed an amended complaint setting forth the federal causes of action with the requisite specificity.

A second amended complaint was filed by the petitioner. It was nearly identical to the original and first amended complaints. The District Court then dismissed all of the remaining federal claims with prejudice, based upon the petitioner's failure to set forth a cause of action upon which relief may be

granted.

A timely appeal was taken by the petitioner to the United State Court of Appeals for the Third Circuit. In a judgment order dated September 7, 1994, the Court of Appeals affirmed the judgment of the District Court. The petitioner now seeks review of the above judgments entered by the Court of Appeals and the District Court in his petition for writ of certiorari.

ARGUMENT

The petitioner sets forth three reasons for which this court should grant the requested review:

(1) the district court incorrectly decided facts (Petition, p. 10);

(2) the district court applied the wrong law (Petition, p. 11); and

(3) the district court's judgment is wrong (Petition, p. 13).

As to each of the reasons, he simply sets forth the reasons for which he disagrees with the conclusions reached by the district court and affirmed by the court of appeals. He does not, however, state any reasons which are either special or important and, certainly, none which rise to the character sufficient to warrant a review by this court. It is simply impossible for this court to review every decision of a district court, or even a court of appeals, in which the losing party believes that the court incorrectly decided facts, applied the

Wrong law, or issued a judgment which was wrong.

Review by this court must be limited to matters which are of the utmost importance to our society and the administration of justice in this country. Nothing raised in the petition for writ of certiorari under consideration even hints at rising to such a character.

Petitioner made several claims against respondent, Anthony Giunta, including federal civil rights and RICO claims and other pendant state claims.

With regard to the basis on which the civil rights claims were dismissed against Mr. Giunta, a county probation officer, this court has denied certiorari in cases

in which similar issues were raised. Sykes v. James, 13 F.3d 515 (2nd Cir., 1993) cert. den., _____ U.S. _____, 114 S.Ct. 604, 129 L.Ed.2d 867 (1994) (parole officer absolutely immune in 1983 suit for claims that he submitted false testimony in state habeas corpus proceeding.) See also, Thompson v. Duke, 882 F.2d 1180 (7th Cir., 1989) cert. den., 495 U.S. 929, 109 L.Ed.2d 496, 110 S.Ct. 2167 (1990) (parole officials held absolutely immune from 1983 liability in connection with the failure to schedule and hold a timely parole violation hearing.) Sellars v. Procunier, 645 F.2d 1295 (9th Cir., 1981) cert. den., 454 U.S. 1102, 70 L.Ed.2d 644, 102 S.Ct. 678 (1981) (parole board officials are entitled to absolute immunity in 1983 suits for actions taken when processing parole applications.)

In this case, the petitioner alleged in his complaint that Mr. Giunta conspired with the other respondents to deprive him of custody and visitation of his minor child and that he refused to file a probation violation petition when he was informed by the respondent of a possible basis for a parole violation. The circuit courts have afforded absolute immunity from such civil rights claims. Turner v. Barry, 856 F.2d 1539 (D.C. Cir., 1988). Also Demoran v. Witt, 781 F.2d 155 (9th Cir., 1985). Thompson v. Burke, 556 F.2d 231 (3rd Cir., 1977). Harper v. Jeffries, 808 F.2d 281 (3rd Cir., 1986). Wilson v. Rackmill, 878 F.2d 772 (3rd Cir., 1989). The district court also noted that petitioner did not appear to have standing to bring suit against a probation officer for failing to file a probation violation

against another person. As such, the district court had reasons for properly dismissing the complaint.

Although this court has not issued an opinion squarely addressing the merits of this claim, in Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), a prosecuting attorney was held to be absolutely immune from 1983 claims relating to the filing of criminal charges. Similarly, in Butz v. Economou, 438 U.S. 478, 57 L.Ed.2d 895, 98 S.Ct. 2894 (1978), executives of the United States Department of Agriculture were afforded absolute immunity from 1983 claims relating to the initiating or continuing of an agency proceeding. This court stated:

> We also believe that agency officials

> performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such actS . . . The discretion which executive officials exercise with respect to the initiation of administrative proceedings might be distorted if their immunity from damages arising from that decision was less than complete.

Butz, 438 U.S. at 515, 57 L.Ed.2d at 921. In this case, the claim presented is predicated upon the probation officer's failure to initiate a probation violation proceeding. This process is very much analogous, if not identical, to the processes at issue in Imbler and Butz for which the governmental officials were afforded absolute immunity. Therefore, it is respectfully submitted that there is

amble authority supporting the lower court's dismissal of the 1983 action as to respondent, Anthony Giunta and certiorari should not be granted.

With regard to the RICO claim against Mr. Giunta, petitioner simply disagrees with the conclusion of the district court, affirmed by the court of appeals, that he did not and could not allege injury to business or property requisite to the bringing of a RICO claim. His claims are personal. No review by this court of such a conclusion is warranted. Further, none of the other requisite elements of a RICO action were set forth with requisite specificity in the complaint or either of the amended complaints, as was raised by the respondents in the district court.

CONCLUSION

The petitioner has not raised any issues which warrant the grant of certiorari. The matters raised in his petition are frivolous and without merit.

There is no unsettled question of law, nor is there a conflict among the circuits or between the federal courts and a state court of last resort as to any of the issues present.

Certiorari should not be granted.

Respectfully submitted;

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CERTIFICATE OF SERVICE

I, **JOHN K. GREINER, ESQUIRE,** do hereby certify that three true and correct copies of the within **BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** to the United States Supreme Court dated December 27th 1994, were served upon the following:

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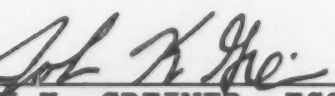

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